



IT IS ORDERED as set forth below:

Date: March 26, 2010

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF:

LORETTA E. CASTRESANA,

Debtor.

NEIL C. GORDON, Chapter 7 Trustee
for the Estate of Loretta E. Castresana,

Plaintiff

v.

VICTOR M. CASTRESANA, GEORGIA
DEPARTMENT OF REVENUE, THREE
FIFTY CORPORATION, COBB
COUNTY BUSINESS LICENSE
DIVISION, COBB COUNTY TAX
COMMISSIONER,

Defendants.

CASE NUMBER: A05-74926-PWB

IN PROCEEDINGS UNDER
CHAPTER 7 OF THE
BANKRUPTCY CODE

ADVERSARY PROCEEDING
NO. 09-6200

ORDER ON MOTION FOR DEFAULT JUDGMENT

The Chapter 7 Trustee is in possession of \$90,183.79 representing net proceeds following the foreclosure sale of real property jointly titled in name of Debtor, Loretta E. Castresana, and Victor Castresana, her non-debtor spouse. The Trustee asserts that the property and, thus, the proceeds, are subject to a number of liens and interests including recorded tax liens against both the Debtor and Mr. Castresana jointly, as well as liens held by Cobb County Tax Commissioner, Three Fifty Corporation, and Cobb County Business License Division against Mr. Castresana only.

The Trustee's complaint seeks a determination as to the extent and priority of the Defendants' liens and interests in the property. The Trustee asserts that, after payment of the liability owed jointly to Georgia Department of Revenue from the sale proceeds, the balance should be allocated one-half to the bankruptcy estate, free and clear of any further liens, claims or interests, and one-half to Mr. Castresana, subject to the liens against his interest. The Trustee contends that the liens should be paid from his proceeds as follows: Cobb County Tax Commissioner liens, Cobb County Business License Division liens, and the balance to the Three Fifty Corporation.

Victor M. Castresana, Cobb County Business License Division and Cobb County Tax Commissioner failed to answer¹ and the Trustee now seeks entry of default judgment against them as follows: (1) one-half of the excess sales proceeds is retained by the estate free and clear of the interests and liens of the defaulting parties; and (2) one-half of the excess sale proceeds is the property of Mr. Castresana subject to the judgments due against his interest in the property.

Because Cobb County Business License Division and Cobb County Tax Commissioner

¹Both Georgia Department of Revenue and Three Fifty Corporation have filed answers.

failed to answer, their defaults constitute admission of the complaint's material facts under Rule 8(b)(6) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7008 of the Federal Rules of Bankruptcy Procedure. Accordingly, it is appropriate to enter default judgment finding that neither has an interest in the one-half of proceeds held by the bankruptcy estate.

The Trustee also seeks default judgment against Mr. Castresana. The motion for default judgment discloses Mr. Castresana died after service of the summons and complaint, but prior to the request for entry of default judgment. The Trustee contends that “Mr. Castresana had contacted the Trustee and advised him that he was not going to contest the Complaint.” (Motion, ¶ 20).

The Court concludes that it is unable to enter judgment against Mr. Castresana in light of his passing. Capacity to sue or be sued is determined, in the case of an individual, by the law of the individual’s domicile. FED R. CIV. P. 17(b)(1), *made applicable* by FED. R. BANKR. P. 7017. Georgia courts have recognized that “[a] deceased person cannot be a party to legal proceedings” and that “[w]hile the death of a party does not abate a pending action where the cause of action survives [], nevertheless the effect of the death is to suspend the action as to the decedent until someone is substituted for the decedent as a party to the proceedings.” *Allen v. Cloudburst Mfg. Co.*, 162 Ga.App. 188-189, 290 S.E.2d 529, 530 (1982) (citations omitted). Under Georgia law, proceedings held after the death of an individual are void. *Ashburn Bank v. Gorday*, 189 Ga. App. 565, 377 S.E.2d 30 (1988) (order denying cross-summary judgment motions after death of one party without substitution of proper party was void).

In order to adjudicate the issue of Mr. Castresana’s interest in the sale proceeds, it is necessary to substitute the appropriate party in interest who now represents Mr. Castresana’s

interests, such as his personal representative or executor of his estate, to the extent one exists. The Court notes that, to the extent that Mr. Castresana's personal representative has no interest in the bankruptcy estate's one-half proceeds, it may be appropriate to direct that the remaining one-half of the funds belonging to him be distributed to the personal representative to hold and distribute in accordance with the probate of his estate. Accordingly, it is

ORDERED that the motion for default judgment as to Victor Castresana is denied. It is

FURTHER ORDERED that the motion for default judgment is granted as to Cobb County Business License Division and Cobb County Tax Commissioner in that the Court concludes that neither holds any interest in the one-half of proceeds held by the bankruptcy estate.

End of Order

Distribution List

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